NO. 81-2389

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1981

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ALEXANDER L. STEVAS,
CLERK

Asar M. Stepak, Appellant

v.

Rutgers Medical School-
a Division of the University
of Medicine and Dentistry of
New Jersey; the Board of
Trustees of the University
of Medicine and Dentistry
of New Jersey; the Department
of Higher Education of the
State of New Jersey and the
State of New Jersey; jointly,
severally, and/or in the alternative,
Appellees

ON APPEAL FROM THE NEW JERSEY STATE
SUPREME COURT

BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM

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ARGUMENT

I. Challenge to Constitutionality of State Statute Was Adequately Drawn In Question so as to Invoke this Court's Jurisdiction on Appeal

That a claim based upon 42 U.S.C. 2000c-8 in the within matter could only be viewed as intending a challenge to the "Medical and Dental Education Act of 1970", hereinafter referred to as the "Act", becomes apparent when considering that whereas the purpose of 42 U.S.C. 2000(c)et seq. was to enable the Attorney General to initiate suits against dejure segregation in public education and to enable the Dept. of HEW to allocate federal funds to public schools in a manner which promoted desegregation of de jure segregated schools it was not designed to expand the prexisting rights of individuals or create new rights against segregation or discrimination in public education, Swann v. Board of Education,402 US 1,16. Thus 42 U.S.C. 2000c-8 cannot be construed as conferring any greater individual rights against discrimination than that which existed previous to its enactment. In fact, the sole purpose of 42 U.S.C. 2000c-8 was to assure that none of the provisions of 42 U.S.C. 2000(c)et seq. diminished any prexisting rights to action

against discrimination. In this regard, a claim based on 42 U.S.C. 2000(c)-8 could then only be considered as an action directed against some prevailing condition or circumstance which as an direct outgrowth of the Dept. of Educ. policies pursuant to 42 U.S.C. 2000(c) et seq. and/or having the sanction of the U.S. Attorney General pursuant to 42 U.S.C. 2000c-6 diminished an individual's right to sue against discrimination. There is nothing in 42 U.S.C. 2000c-8 that prohibits discrimination in an absolute sense or guarantees a right to action against discrimination- such rights vest in the claimant by other statutes and constitutional principles. Thus, the phrasing of appellant's claim based upon 42 U.S.C. 2000c-8 in the pleading, count VII, paragraph 5, which states,

> "42 U.S.C.A. 2000c-8 vests a right in any person to sue for relief in any court against discrimination in public education. Based upon the aforesaid discrimination by the Admissions Committee, plaintiff herein exercises the right granted by 42 U.S.C.A. 2000c-8". ,

could only be reasonably construed as intending a direct challenge to the "Act" which was presumed to have been enacted pursuant to the provisions of 42 U.S.C. 2000(c) et seq. in order to counter what was deemed prexistent de jure segregation

at the State's medical schools.*

In a similiar vein, the phrasing of the claim based upon 42 U.S.C. 2000c-8 in the pleading could not be plausibly considered as a claim based upon a violation of individual rights since 42 U.S.C. 2000c-8 by itself does not vest in an individual an absolute right to trial nor right to action against discrimination. What 42 U.S.C. 2000c-8 does guarantee is that any condition or circumstance arising to stem the aftereffects of what was thought of as de jure segregation pursuant to the provisions of 42 U.S.C. 2000(c) et seq. does not diminish an individual's right to sue against discrimination in public education. Thus, the only absolute right vesting in 42 U.S.C. 2000c-8 is that nothing arise from 42 U.S.C. 2000(c) et seq. that would infringe upon rights to sue against discrimination in public education. In terms of individual rights 42 U.S.C. 2000c-8 does not guarantee a right to trial in a State court as might be inferred by a literal reading of the phrasing of Count VII, paragraph 5, of the

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* Whether the prevailing conditions at the State's medical schools could be plausibly described as dejure segregation previous to the "Act" is one of the substanstial constitutional questions this case poses.

pleading but does absolutely guarantee that no statutory enactment or educational directive stemming from 42 U.S.C. 2000 et seq. diminish the import of other rights to action. Thus, considering that previous to the "Act" Rutgers Medical School did not have the authority to diminish or deprive an aggrieved applicant's access to the courts, appellant's claim based upon 42 U.S.C. 2000c-8, viewed in the context of its phrasing in the pleading, clearly intended a constitutional challenge to the "Act" since it was only the "Act" that violated or diminished appellant's rights to trial. Even putting the impact of the "Act" aside [redacted] and postulating that Rutger's novel approach to race were the direct result of HEW directives pursuant to 42 U.S.C. 2000(c) et seq., such circumstance would not necessarily diminish appellant's right to trial but,rather, might pose an unsettled matter of law to be decided by a trial. In any event, claims based on 42 U.S.C. 2000c-8 could not be invoked in terms of guaranteeing the individual claimant an absolute right to trial but only a right to trial to the extent vested by other rights of action. If Rutgers' reliance on race as a result of

42 U.S.C. 2000(c) et seq. was such that other rights of action did not vest a right to sue, action to sue could not, therefore, be invoked under 42 U.S.C. 2000c-8. One may conclude, therefore, the the phraseology of appellant's claim based upon 42 U.S.C. 2000c-8 in the pleading, specifically, "...vests a right in any person to sue for relief..." and "...plaintiff herein exercises the right...", could only be reasonably construed as intending a direct challenge to the validity of the "Act".

In addition to a challenge to the "Act" being intended as early as the pleadings, reference was made to the challenged statute in appellee's trial court brief, (Aa18* to Aa21), and appellant's briefs in support of certification to the State Appellate Div., Appellate Div. Brief, see record below** and, also, by the trial court in its reinstatement order, (Aa8 to Aa9). Moreover, no reason appears that appellant should have assumed his claim based upon 42 U.S.C. 2000c-8 in the pleading inadequately posed a statutory challenge since the appellant had referred the matter to the N.J. Legal Ethics Committee, (Ab12), which discovered no inadequacy in the phrasing of the

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* Refers to Jurisdictional Statement.

** See Clerk's file, request for certification and transmission of the state court record, Aug. 24th, 1982 letters to Mr. Alexander Stevas and Mr. Stephen Townsend, and Sept. 7th, 1982 letter to Mr. Townsend.

claim which was prepared by former counsel, Mr. Jeffrey I. Baron, Gibbs v. Burke, 337 US 773,779. It appears unlikely that the Ethics Committee would have discerned no insufficiency in Mr. Baron's wording of the claim if the claim were not construed as posing a challenge to the "Act".

Even a determination that a challenge to the "Act" was not meritorious based upon 42 U.S.C. 2000c-8 such that appellant would have to rely on claims based on 42 U.S.C. 2000d, 20 U.S.C. 1681, etc.*, would not cause appellant's intendment to draw in question a challenge to the "Act" based upon the phrasing of 42 U.S.C. 2000c-8 in the pleading to be any less persuasive.

Thus,it would appear in accordance with rules of intendment, New York ex rel Bryant v. Zimmerman, 278 US 63,67, where it was established no specific form of words are essential in drawing in question a federal claim or statutory challenge, that appellant's presentment of his federal claims adequately intended a challenge to the "Act".

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* Appellant was barred from amending his complaint by the trial court's summary judgement, (Ab17).

II. The Constitutionality of the "Medical and Dental Education Act of 1970" Was Considered and Sustained by the State Court

The statement in the reinstatement order, (Aa8 to Aa9), " that this matter involves issues of public importance as to the admissions policies of a public agency", confirms the State court considered the constitutionality of the "Act" which the court construed as conferring agency status on the University of Medicine and Dentistry of N.J. and Rutgers Medical School. Were the constitutionality of the "Act" not considered by the State court it is unlikely that reinstatement could have been granted since any claim based upon individual rights would have been too severely prejudiced by the two year delay to justify reinstatement, Zaccardi v. Becker, 162 N.J. Super. 329. But even if reinstatement were still to be granted based upon the public importance of issues concerning the permissable use of racial factors in professional school admissions, the reinstatement order would have then had to been worded differently substituting the phrase, "admissions policies of a public agency", with phrasing to the effect, "extent race may be relied upon by a professional school". When, also, considering that the trial court subsequently granted Summary Judgement

to appellees, notwithstanding the unsettled factual dispute between litigants concerning the extent race was relied upon by the admissions committee, the phrasing in the reinstatement order, "admissions policies of a public agency", clearly points to reinstatement for purposes of adjudging the validity of the "Act".

Being that the State court may have had a propensity to stave off a constitutional challenge to the "Act" for reason that the "Act" has been deemed constitutionally valid for over 10 years, the State Supreme Court's denial to grant certification to the Appellate Div., (Aa15), could be understood in terms that in affirming the lower court it simply considered a challenge to the"Act" as patently frivolous. But were it not for the "Act" the State Supreme Court could not reasonably justify appellant's being deprived a trial. In other words, had the State Supreme Court not viewed a constitutional challenge to the "Act" as patently frivolous or , instead, decided to evade consideration of the "Act" altogether, then,it is inconceivable that it would decline appellant's petition for certification based upon the procedural abnormalities which barred abjudication of appellant's claims by the State court and/or substantial constitutional questions concerning the challenge to the "Act" itself.

As stated in Charleston Fed. Savings et al v. Alderson State Tax Commission, 324 US 182,186, "Where it appears from the opinion of the state court of last resort that a state statute was drawn in question as repugnant to the Constitution, and that the decision of the court was in favor of its validity, we have jurisdiction on appeal. For we need not inquire how and when the question of the validity of the statute was raised, when such question appears to have been actually considered and decided by that court." It is therefore contended that in the context of the proceedings of the State court and the denial of petition of certification by the State Supreme Court, that the State court sustained the constitutionality of the "Act" in a manner sufficient to invoke this Court's jurisdiction on appeal.

III. If Constitutionality of Statute Were Not Deemed as Having Been Determined by the State Court Than the State Court Must be Considered as Having Evaded the Statutory Challenge and Related Federal Constitutional Questions

If statutory challenge were not to have been deemed as sufficiently drawn into question or determined in the state court so as to invoke this Court's Jurisdiction on Appeal, than the state court's construence of its Summary Judgement Rule in allowing for dismissal of material issues must be considered as having barred adequate presentation of constitutional issues and/or permitted the state court to evade determination of a statutory challenge and related federal constitutional questions in direct violation of the Federal and State Constitutions, Fidelity and Deposit Co. of Maryland v. United States, 187 US 315; Chemical Foundation Inc. v. Universal Cyclops Stell Corp., 2 FRD 283; N.J. State Constitution of 1947, Article 1, paragraph 9, rights to jury trial-modeled after 7th Amendment to the Federal Constitution; Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J.67. Moreover, when it appears a state rule or procedure bars a litigant from adequately raising an issue as to a federal right, this Court will

consider the issue as adequately raised, Central Union Tel. Co. v. Edwardville, 269 US 190, 194-195.

On the other hand, to conclude that as a matter of law genuine issues of palpable injury are dismissable in Professional School Admissions merely because the alleged proponents* deny any such injury being within their capacity to impose would infringe the separation of powers principle in depriving rights of action of the claimant guaranteed by the Federal Constitution. Redefinition as to what is appellees' raw capacity to injure, clearly, can only be a legislative one since the law, all other factors being equal, presumes proclivity to injure uniformily distributed in the population. For the law to depict immorality or malice assymetrically embedded in the population in some way would allow it to presume guilt or innocence based merely upon the adversaries. As it is a question for the legislative branch of state government whether to grant a state entity an legal immunity by legislative enactment in the public interest, this court could only reverse the decision below if it concludes that the state court's consideration of a statutory act was not the premise for

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* A singular medical school admissions committee evaluating all student applicants.

its summary judgement ruling.

Clearly, then, any conclusion by this Court that in the within matter the summary judgement in the state court were not the result of the state court's sustaining the validity of the "Act" would not justify granting appellees' motion to dismiss or affirm for reason that:

1. It is the legislative and not judicial branch of government which is vested with the authority of repealing constitutional rights to legal action.
2. Any construence of the summary judgement rule as depriving or diminishing appellant's constitutional rights to action by its disregard for material issues in professional school admissions would be in direct controversion with previous decisions of this Court, Fidelity and Deposit Co. of Maryland v. United States 187 US 315 and subject to constitutional challenge on appeal.

Furthermore, if the summary judgement is not considered premised upon the constitutionality of the "Act" which deprived a litigant access to the courts, it would have to be viewed as obstructing the litigants presentation of federal claims through the normal sequence of events of amendment of complaint in controversion to summary judgement and development of issues

during trial. Thus, appellant would not be barred from invoking this Court's jurisdiction on appeal for reason of the state court's evasion of his claims. Plainly, therefore, this Court would appear precluded from granting appellee's motion to affirm or dismiss by virtue of the state court's evasion of the constitutional challenge through misapplication of procedures pertaining to its summary judgement.

There is little doubt that further trial court proceedings would have resolved any ambiguity of whether it was the state court's construence of the "Act" or some agency order sanctioned by the"Act" upon which the court's reinstatement order was based,* (Aa8 to Aa9). However, the court's ambiguity did not affect consideration of the constitutional issues since if the "Act" were deemed constitutional as construed by the state court so would the agency order or law the "Act" sanctioned or vice versa. Therefore, the ambiguity would not have been of any import except for condoning any lack of particulariness on the part of the appellant in his presentment of the statutory challenge. Thus, although the

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* There appears to be some ambiguity, albeit inconsequential to consideration of appellant's claims, whether the state court was referring to the "Act" or some agency order or law by the phrase "admissions policies of a public agency" in its reinstatement order.

summary judgement which barred further trial court proceedings would explain any lack of particularines in appellant's challenge to a specific statute, the determination of Rescue Army v. Municipal Court, 331 US 549 would not appear applicable to the present case as the constitutional questions presented are vivid not requiring further specification of the statute for their consideration.

The constitutional question posed is whether the "Act" and admissions laws of the University of Medicine and Dentistry of N.J. can be considered constitutionally valid when as construed by the state court its impact and effect is to annul specific federal statutes and suspend federal constitutional principles. The constitutional issues presented are clearly meritorious and substantial that if not requiring further review on appeal by this Court would certainly warrant summary reversal. Indeed, if appellees' assertions were true, that the within matter concerns issues of well settled law or that questions concerning the constitutionality of a statute were never presented or considered by the state court then not only would the state court's summary judgement ruling merit reversal but so too would the state's reinstatement order as it was precisely the public importance of issues pertaining to the challenge of the "Act" upon which reinstatement was based, see

point II, supra.

To sum up, if this Court considers that there is some question as to whether the state court considered the constitutionality of the "Act" prior to rendering summary judgement, then, clearly, the summary judgement ruling should be reversed as it is unlikely that the summary judgement could be justified without a statutory enactment redefining material issues in the present instance. Alternatively, if this court concludes a statutory redefinition of material issues may not be required in the special case of professional school admissions then that would in itself present substantial federal questions pertaining to the separation of powers principle and the constitutionality of the state's summary judgement rule subject to review by this court on appeal, In re Summers 325 US 561, Nashville C and St. L. Ry, Co. v. Wallace, 288 US 249, 259. However, on the other hand, if this Court concurs with that which is contended by the appellant, that the proceedings reveal that the state court considered and sustained the constitutionality of the "Act" and as it deemed a challenge to the "Act" as patently frivolous it denied appellant an opportunity to amend his complaint or develop his presentment during trial, then, the question before this Court is whether the

"Act" violates Federal Statutes and is repugnant to the Federal Constitution.

IV. Conclusion-Challenge to the "Act" Concerns Substantial and Meritorious Federal Questions

The administrative autonomy vesting in the University of Medicine and Dentistry of N.J. is similiar to the autonomy vesting in the State University-Rutgers University with the exception that the effect of the "Act" in creating UMDNJ as a public agency subdivision of the Board of Higher Education was that claims of discrimination by aggrieved applicants directed against UMDNJ or its subdivision, Rutgers Medical School, would not be heard in the first instance in a plenary manner by the State's trial courts. It is clear, then, that a major purpose of the "Act" was to deprive or limit rejected professional school applicants access to the courts since in attempting to promote Health Care and Medical and Dental Education within the state the administrative economy sought by the "Act" by consolidation of the various state run medical and dental colleges into a single state administrative agency could have been accomplished as equally as effective by consolidation into a single public medical school or a state administratively operated medical school without the effect of depriving aggrieved applicants of a trial de novo. Thus the "Act" granted the State a degree of immunity from claims of

discrimination in professional school admissions by suspending the applicability of various federal statutes and federal constitutional principles.

The question presented by the within matter is can the "Act" be valid as construed by the state court if it suspends federal constitutional priciple and federal law for the public interest it professes. It appears that the appellees' contention is that the "Act" was drawn under circumstances where suspension or disregard of federal law should be permitted so to appease appellees senses by making tolerable alleged injustices to which they refer. But, then, by whose senses do we determine what is justice? To say justice is to appease our senses in every instance would be to construct a system of laws based purely on instinct, but whose instinct? What the appellees appear to be suggesting,in this instance, is a judicial standard based on their instincts which they proffer as the law of the State. However, the appellees'approach is anarchistic to say the least as what more can we attribute to modern man's ability to advance technologically and to live in an orderly, civilized society then his capacity to recognize and acknowledge in himself

his own perceptual limitations. Should less be said of the appellees and their counsel?

However, no one will deny that newly concieved laws oftentimes promote the general good of our society. Indeed, the process of legislation conducted by representatives of the citizenry, duly elected and acting on their behalf is the process by which a democracy thrives. But, in a similiar vein, democracy requires basic principles and axioms which serve as the pillars supporting the basic freedoms it guarantees. Stifling the legislative process is no less distasteful as permitting it to flourish uncontrolled, especially, when legislation chips, cracks, and ungirdles the very pillars by which its democratic functions and legislative integrity depend. It is contended herein that the "Act" in such manner loosens and ungirdles our democratic pillars for by the democratic process it overeaches in placing undue strain and burden on the very constitutional principles by which it has been given license. It is by the judiciary in determining the constitutionality of legislation that we, through our democratic legislative processes, do not jeopardize our freedoms or become our own captures. If the judiciary allowed itself to be influenced by every political bandwagon or popular whim of the times, nearsighted as it may be, then

our pillars of democracy might be girded only by mire and our republic vulnerable to destruction from within. Regardless of how tangential the affected population may appear to be, to allow the suspension of minimal protections guaranteed by the Federal Constitution and Federal Law is surely a process by which our democracy is drawn nearer to subterfuge. That the undermining of a democracy may be accomplished gradually would not lessen the devastating impact of the final outcome. It is for these reasons that the "Act" which suspends the application of Federal Constitutional principles and Federal Law is self-defeating.

In conclusion, therefore, it is respectfully submitted that the appellant's state court challenge of the "Act" presents substantial and meritorious federal questions warranting summary reversal of the state court or plenary review by this Court on appeal.

Respectfully submitted,

Asar M. Stepak

Dated: Sept. 26th, 1982

Asar M. Stepak,
Appellant, Pro Se